

INSTRUCTION CPL 2-0.51J



TO: TOSHA Personnel

FROM: Robert B. Cooper, Chief, Standards & Procedures *RBC*

THRU: John D. Winkler, Interim Director

SUBJECT: Enforcement Exemptions and Limitations Under the Federal Appropriations Act

DATE: March 8, 1999

- A. **PURPOSE:** This instruction explains the limits (exemptions and limitations) for the Occupational Safety and Health Administration's (OSHA's) enforcement activity under the Appropriations Act. OSHA's limits are extended to TOSHA under the 29 U.S.C. 672(g) [§23(g)] grant of funds. This funding measure's riders and this instruction focus on limiting the inspection of those employers who employ ten (10) or fewer employees.
- B. **DOCUMENTS REFERENCED:**
- TOSHA Field Operations Manual (FOM).
 - 2. TOSHA Instruction CPL 2.115; September 30, 1996; Complaint Policies and Procedures.
 - 3. This instruction adopts the provisions of OSHA Instruction CPL 2-0.51J; May 28, 1998; Enforcement Exemptions and Limitations under the Appropriations Act.
- C. **DOCUMENTS AFFECTED:** TOSHA Instruction CPL 2.1D; June 1, 1995; Implementation of Exemptions and Limitations Contained in Annual Federal Appropriations Acts is canceled.
- D. **BACKGROUND:** In providing funding for OSHA and for State Plan administration through OSHA, Congress has placed restrictions on enforcement activities regarding two categories on employers; small farming operations and small employers in low-hazard industries. The Appropriations Act contains limits for OSH Act activities, and therefore TOSH Act activities, on a year-by-year basis.
- E. **KEY TERMS:** Definitions pertinent to this directive are the following:
- 1 A "farming operation" means and operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have a two digit Standard Industrial Classification

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(SIC) Codes of 01 (Agricultural Production - Crops), 02 (Agricultural Production - Livestock and Animal Specialties), and four digit SIC Codes 0711 (Soil Preparation Services), 0721 (Crop Planting, Cultivating, and Protecting), 0722 (Crop Harvesting, Primarily by Machine), 0761 (Farm Labor Contractors and Crew Leaders), and 0762 (Farm Management Services).

2. A **"temporary labor camp"** means farm housing directly related to the seasonal or temporary employment of farm workers.
3. **"Housing"** includes both permanent and temporary structures located on or off the property of any employer who meets the above definition.
4. **"Lost Workday Injury Rate Below the National Average"** is an occupational lost workday injury (LWDI) rate which is lower than the national average for the private industry sector, as most recently published by the Bureau of Labor Statistics, at the most precise SIC code for which such data is published, using the 1987 manual.

F. GENERAL ENFORCEMENT GUIDELINES: Before initiating enforcement activities TOSHA will decide whether the appropriation rider prohibits OSHA/TOSHA enforcement. Where this determination cannot be made before hand, the Compliance Officer (CO) will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the CO must immediately discontinue the inspection activities and leave the premises as soon as possible. The following table provides an at-a-glance reference to our activities under the funding measure.

Exceptions and Limitations			
	TLC = Temporary Labor Camp	EES = Employees	ERS = Employer
TOSHA Activity	Farm with 10 or fewer EES and no TLC activity within 12 months	Farm with more than 10 EES or a farm with an active TLC within 12 months	Non-farm ERS with 10 or fewer EES in a SIC Code listed in <u>Appendix A</u>
Programmed Safety Inspections	Not Permitted	Can Inspect	Cannot Inspect
Programmed Health Inspections	Not Permitted	Can Inspect	Can Inspect
Employee Complaint	Not Permitted	Can Inspect	Can Inspect -See limits on Citations and Penalties
FAT/CAT and Accidents	Not Permitted	Can Inspect	
Imminent Danger Discrimination 11(c)/TCA§50-3-409	Not Permitted	Can Inspect Can Investigate	Can Inspect Can investigate
Consultation and Tech. Assistance	Not Permitted	Permitted	Permitted
Education and Training	Not Permitted	Permitted	Permitted
Conduct Surveys & Studies	Not Permitted	Permitted	Permitted

G. ENFORCEMENT GUIDANCE FOR SMALL FARMING OPERATIONS: The Appropriations Act exempts small farming operations from enforcement of all rules, regulations, standards, or orders under the Occupational Safety and Health Act.

A farming operation is exempt from all OSHA/TOSHA activities if it:

- a. Employs ten (10) or fewer employees currently and at all times during the preceding twelve (12) months; and
- b. Has not had an active temporary labor camp during the preceding twelve (12) months.

NOTE: Family members of farm employers are not counted when determining the number of employees.

2. A farming operation with ten (10) or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp with the last twelve (12) months is not exempt from inspection. For TOSHA the inspection includes all standards as Tennessee did not relinquish authority for enforcement of 29 CFR 1910.142, Temporary Labor Camps, and 29 CFR 1928.110, Field Sanitation, to the Wage and Hour Division, U.S.D.O.L.

H. ENFORCEMENT GUIDANCE FOR SMALL EMPLOYERS IN LOW-HAZARD INDUSTRIES: The Appropriations Act exempts small employers in low-hazard industries from **programmed safety inspections**.

- 1 No programmed safety inspections are permitted of a small employer if:
 - a. It employs ten (10) or fewer employees currently and at all times during the preceding twelve (12) months; and
 - b. The lost workday case rate for its primary SIC Code work activity is below the all-industry national average (**See Appendix A for listings.**).
2. The Appropriations Act allows several OSHA/TOSHA activities in establishments of small (10 or fewer employees) low-hazard rate employers that are exempt from programmed safety inspections. All OSHA/TOSHA Offices are allowed to:
 - a. Provide consultation and technical assistance as well as educational and training services. It can also conduct authorized surveys and studies.
 - b. Investigate or schedule inspections in response to an employee complaint in accordance with current complaint procedures (see B.2. of this instruction). The only complaint inspections which **are permitted** under the rider are those from **current** employees.

Citations may be issued for any violation found during a complaint

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inspection whether or not the violative condition is a subject of the complaint. But

- ii. Penalties may only be assessed when the violations are classified as willful violations or failure to abate notifications and when such violations are failure to abate notifications are related to the original complaint.
- c. Take any action authorized by the Act with respect to alleged imminent danger situations.
- d. Take any action authorized by the Act with respect to **health hazards**.

Health inspection are to be scheduled, observed health hazards cited, and penalties assessed for all classifications of violations in accordance with current procedures.

- ii. Apparent safety violations noted during a health inspection of an establishment exempted from programmed safety inspections shall not be cited or referred for later inspection unless such violations create an imminent danger.
- iii. If the inspection is a health-related complaint, the procedures in paragraph H.2.d. take precedence over the procedures in paragraph H.2.b.

NOTE: A Compliance Officer can discuss non-citable violations during the closing conference and provide information relating to consultation services.

- 3. Take any action authorized by the Act with respect to employment accidents involving a fatality of one or more employees or hospitalization of two or more employees. All apparent violative conditions involving safety or health may be cited and penalties proposed related to the accident.

NOTE: The reporting requirements of Rule 0800-1-3-.12 have not changed. Employers are not obligated to report accidents involving overnight hospitalization of fewer than three employees. However, OSHA/TOSHA is allowed to conduct any accident investigation of a small, non-farming, employer once the agency is aware that an accident as described above has occurred. Where TOSHA learns of such accidents, we can inspect or investigate.

- 4. Take any action authorized by the Act with respect to alleged discrimination against employees.

LATE DISCOVERY OF EXEMPTION: If it becomes clear after an inspection that the employer was exempt from inspection at the time of the inspection, the Area Supervisor shall ensure that no citations are issued or penalties proposed contrary to the provisions of this instruction.

- 1 If already issued, but not yet contested, any such citation or proposed penalty shall be **withdrawn if it is a citation with no penalty** or presented for withdrawal in the same manner as a settlement agreement with agreed order if a penalty has been proposed.

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2. If the employer has already filed a notice of intent to contest, the Area Supervisor and/or Branch Chief shall inform the Staff Attorney who shall take appropriate action to ensure that the case is not pursued before the Tennessee Occupational Safety and Health Review Commission except to seek an agreed order deleting the citation and penalty.
 3. If such citations and penalties have become a final order, the Branch Chief and/or Director in consort with the Staff Attorney shall seek an agreed order deleting the citation and penalty.
- J. IMIS:** If an inspection is not conducted because of an Appropriations Act rider exemption, the CO shall complete a TNOSHA-1 Form according to current IMIS instructions. Also, where the scope of an inspection has been limited due to restrictions imposed by a rider to the Appropriations Act, it can be noted in block 46 - Optional Information on the TNOSHA-1.
- K. ACTION:** Area Supervisors and Branch Chiefs shall insure that they schedule and conduct enforcement activities following the guidelines set forth in this instruction.
- L. EFFECTIVE/EXPIRATION DATES:** This instruction is effective upon receipt and shall remain in effect until canceled or superseded.